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No. 106

In the Supreme Court of the United States

OCTOBER TERM, 1930

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COLLECTOR

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BRIEF FOR THE COLLECTOR

OPINIONS BELOW

No opinion was rendered by either the Circuit Court of Appeals for the Ninth Circuit or the United States District Court for the District of Arizona.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on May 8, 1930. On May 26, 1930, this Court granted a joint motion for a writ of certiorari to bring up the entire record. (R. 13.)

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented on the entire record are the same as those certified. These questions are:

1. Under the provisions of Sections 210 and 223 (b) of the Revenue Act of 1926 must the entire community income of a husband and wife domiciled in Arizona be returned and the income tax thereon paid by the husband?

2. Has the wife under Sections 3848 and 3850, Revised Statutes of Arizona, 1913, such an interest in the community income that she should separately report and pay tax on one-half of such income?

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra,* pp. 39–51.

STATEMENT

This case was decided by the District Court for the District of Arizona on a demurrer to the complaint. The facts as set forth in the complaint and admitted by the demurrer are substantially as follows:

I. B. Koch and Margaret E. Koch were married and lived together for more than fifteen years prior to October 15, 1928, and they have maintained their domicile in the State of Arizona. (R. 1.)

Neither husband nor wife had any property at the date of their marriage and neither has since acquired any by gift, devise, or descent. By their joint efforts appellee and his wife had prior to

1927 accumulated certain bank deposits, notes, and corporate stocks from which they received interest in the amount of $42.45 during 1927. The bank deposits, notes, and corporate stocks stood in the name of the husband. The appellee also received a salary of $12,000 for services rendered as manager of the Arizona Lumber & Timber Company. This was the total income which they received during the year. It is admitted that it represented community income. (R. 1, 2.)

The appellee and his wife filed separate returns for 1927 in which each listed the entire interest and salary mentioned above and deductions in the amount of $506.54, consisting of contributions to a church, depreciation of an automobile, and miscellaneous expense and taxes, the sum of $506.54 being the total deductions to which they were entitled. They reported a net income of $11,535.91, or $5,767.96 each, and each paid the tax of $45.81 disclosed by the return. (R. 2, 3.)

Upon the audit of the returns the Commissioner found a deficiency in tax of $102.06 disclosed by the return of the appellee, the deficiency being based on the failure of the latter to report the entire community income and the deductions in his return.

The appellee waived his right to appeal to the Board of Tax Appeals, paid the sum of $105.32 (including interest) under protest, and upon rejection of his claim for refund, which was duly filed, instituted this suit. (R. 3, 4.)

From a judgment in favor of the plaintiff, the Collector appealed to the Circuit Court of Appeals for the Ninth Circuit. That court certified certain questions to this Court. On May 26, 1930, this Court ordered that the entire record and cause be sent up.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In not holding that under the laws and judicial decisions of the State of Arizona the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins*, 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

[1] The following material to stars on p. 6 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 39, construed as similar provisions were construed in the *Robbins case,* do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with re-

spect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

* * * * *[2]

Under the laws and judicial decisions of the State of Arizona, the husband, in addition to having a present interest in the community property equal in all respects to his wife's interest, has full powers of management as to community personalty and substantial powers as to community realty but can not convey, mortgage, or lease the latter without the wife's consent. He is the necessary party in all suits affecting the community property.

The only important restrictions on his powers is that he can not deliberately defraud his wife. This restriction is of little practical benefit to the wife, for while she may under certain conditions sue him for support, whether or not there is any community property, she can not secure a division of the community property or force her hus-

[2] See footnote 1, p. 4.

band to give her one-half or any other portion of the community income. Even upon securing a divorce, she may be awarded alimony instead of a share of the community estate.

While the better view probably is that the community property can not be made liable for the payment of the separate debts or the torts of either husband or wife, it is liable for all of the debts (and probably the torts) of the husband which are related to community affairs and presumably every act of his is undertaken on behalf of the community.

The wife may not bind the community by any contracts other than contracts for necessities. She has no positive powers of control and can not to any substantial degree interfere with the broad powers given to her husband. Her present interest in the community property is no more than a right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property. If the dissolution is brought about by divorce, she may not even receive one-half.

The husband, having substantially all of the present powers of dominion and enjoyment, should be taxed upon the entire community income.

In the particular case this view is the more reasonable for the reason that the income consisted chiefly of the husband's salary. Cf. *Lucas* v. *Earl*, 281 U. S. 111.

ARGUMENT

I

Preliminary Statement[3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298, 435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico, and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

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[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 40. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the commencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

II

Where the Husband has Control Over and the Right to Enjoy the Entire Community Income He is Required to Include it in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words.

There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where the definitions of property rights and titles vary with the local laws.

The view originally held in the Treasury Department and in the Department of Justice (T. D. 3071, *supra;* T. D. 3138, *supra;* 32 Op. A. G. 298, 435, *supra,* that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income *"of every individual."* (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the statute involved in the *Robbins case, supra,* and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 39.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax thereon. The tax is imposed upon the income of individuals, and the application of this language to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or

wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, Sections 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole.* For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, Sec. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the

> cases where they are liable under the law. Sec. 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers,* 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271.

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> *Chase National Bank* v. *United States*, 278 U. S. 327. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.
>
> Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate, it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra*, p. 39, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case*, do not require the taxation of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case*, as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is dis-

tributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case*. Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition of the fund; that he might spend it substantially as he chose, and that if he wasted it in debauchery, the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights, and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights and powers of individual taxpayers in controlling and disposing of income received. "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Arizona, because of their community of interest in property which either may acquire during wedlock,

are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated.

The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 245 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309.

The test that he who has the power of disposition should bear the burden of the tax finds support in the general language of the statute and so to construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins,* 269 U. S. 315; *Corliss* v. *Bowers,* 281 U. S. 376; *Tyler* v. *United States,* 281 U. S. 497; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Arizona and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Arizona the Husband's Interest in the Community Income Is Such that He Should Properly Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such that She Should Be Permitted to Report One-Half of the Community Income in Her Return [6]

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights of the husband and wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal, even with his own property, universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her

[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

support after his death. Thus a limited right in the wife to bind the community by contracts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 573, and cases cited.

Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 4385. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This gives the wife no greater right (except as to the amount) than she has in Oklahoma where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224 of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate, and even those States protect the wife's interest in the homestead. In practically all States provisions which give to the wife the assurance of receiving a certain proportion of the husband's real estate upon his death are accompanied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss case,* to "actual command" of the income taxed,

so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was

derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent.

For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy, and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du Palais Repertoire, verbo, communauté, 739, 741, *et seq.*

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Arizona which disclose the rights of the spouses to control and enjoy community property and its income.

* * * * * * * [7]

The statutory community property law of Arizona, which in 1875 replaced the Spanish law of community existing theretofore (see McKay on Community Property, 2d. ed., Section 1266), has no particularly distinguishing features. The statute was copied from the California statute, which it closely resembles. In many respects also its provisions are similar to those of Washington which are quoted and analyzed *in extenso* in the Government's brief in the case of *Poe* v. *Seaborn, supra.* The similarity of the Washington and Arizona statutes is commented upon in the case of *Cosper* v. *Valley Bank,* 28 Ariz. 373, 379.

Under the provisions of Section 3850 of the Arizona Revised Statutes of 1912 (*infra,* p. 45) the term "community property" includes all property acquired during coverture except that acquired by gift, devise, or descent. It does not, however, include the income, rents, issues, and profits of the separate property of husband and wife. Section 3848, *infra.* Nor does it include the earnings of the wife while living separate and apart from her husband. Section 3849, *infra.* In any contest be-

[7] See footnote 6, p. 18.

tween separate and community property, Arizona gives effect to the generally accepted presumption that all property acquired during coverture is community property. *Malich* v. *Malich,* 23 Ariz. 423; *Jones* v. *Rigdon,* 32 Ariz. 286.

Arizona also has failed to develop a distinctive philosophy of community ownership which is comparable to the "community entity theory" of Washington and to the "partnership" or "trust theory" of Texas. See brief for the Collector in *Poe* v. *Seaborn, supra,* and brief for the petitioner in *Geo. C. Hopkins, Collector of Internal Revenue,* v. *C. W. Bacon,* No. 84 on the docket of this Court for the present term.

The Supreme Court of Arizona has declared in a general way that the equitable interests of the husband and wife are equal, *La Tourette* v. *La Tourette,* 15 Ariz. 200; *Cosper* v. *Valley Bank, supra;* and in the latter case it said (28 Ariz. at p. 376) that the wife's interest was a "vested legal one, the same as the interest of any other partner in partnership property." There is at least one suggestion that it resembles ownership by tenants in the entirety. *La Tourette* v. *La Tourette, supra.* If this were a true analogy it would support our view that the husband's right of dominion and enjoyment is superior. Cf. *Tyler* v. *United States,* 281 U. S. 497. But the analogy breaks down upon comparison of substantial rights and obligations defined by statutes and authoritative decisions. This

is merely another illustration of the necessity of looking through false names to the substance of rights and powers.

Under the decision in the *Robbins case, supra,* the true test is what the husband has a right to do with the community property and income and whether the wife has actually any present right of control and enjoyment.

(A)

THE HUSBAND IS GIVEN COMPLETE AND EXCLUSIVE POWER DURING COVERTURE TO DISPOSE OF COMMUNITY PERSONAL PROPERTY AND TO BIND THE COMMUNITY BY CONTRACTS CONCERNING IT AND HE IS THE NECESSARY PARTY IN SUITS RELATING TO IT

Sections 403, 405, 3850 of the Arizona Revised Statutes, *infra.*
Stiles v. *Lord,* 2 Ariz. 154.
Gristy v. *Hudgens,* 23 Ariz. 339.
La Tourette v. *La Tourette,* 15 Ariz. 200.

Section 3850 of the Revised Statutes of Arizona, *infra,* gives the husband the unrestricted right to dispose of community personal property. He has the entire management and control with the absolute power of sale. See *Stiles* v. *Lord, supra.*

The case of *Gristy* v. *Hudgens, supra,* illustrates the extent of the husband's power. In that case the husband, as a member of an employees' benefit association, had named his wife beneficiary and subsequently changed the beneficiary before his death. The court held that the record did not

show that the insurance premiums were paid from community funds but concluded that even if they had been the wife could not complain. The court said (p. 348):

> Even if this court should assume that to be true, there is no showing or statement that such funds were paid in fraud of the wife's rights, and no showing that the wife had not received even more than her share of the community property. Furthermore, it is elementary that the husband has a right to dispose of the personalty belonging to the community as he sees fit, providing that he does not, by his disposal of the same, thereby defraud his wife.

It is thus established that the only restriction on the husband's control of personalty is that he can not dispose of it with the deliberate intention of defrauding his wife. See *La Tourette* v. *La Tourette, supra.* The same restriction exists in California and Washington.

Under Section 403 of the Arizona Revised Statutes requiring that the husband be joined with the wife whenever she is a party (except in suits affecting her separate property), the husband is a necessary party in all suits against the wife relating to community property. *Benson* v. *Hunter,* 23 Ariz. 132; *Hageman* v. *Vanderdoes,* 15 Ariz. 312. See also Section 405 of the Arizona Revised Statutes, *infra,* as to suits against husband and wife relating to the wife's contracts for necessities. It

is also well settled that the husband without joinder of the wife may be sued on his contracts with regard to community personalty. *First Nat. Bank of Mesa* v. *Reeves,* 27 Ariz. 508.

(B)

THE HUSBAND HAS THE MANAGEMENT AND CONTROL OF THE COMMUNITY REAL ESTATE AND MAY BIND THE COMMUNITY BY HIS CONTRACTS RELATING TO IT, EXCEPT THAT THE WIFE MUST JOIN IN ALL DEEDS AND MORTGAGES

Sections 2061, 3850, Arizona Revised Statutes, *infra.*

Pendleton v. *Brown,* 25 Ariz. 604.

Section 2061 of the Revised Statutes of Arizona, *infra,* provides that no "conveyance, transfer, mortgage or incumbrance" of any community real estate shall be valid unless executed and acknowledged by both husband and wife, except that unpatented mining claims may be conveyed, etc., by the one having title or the right to possession. Section 3850, *infra,* requires that the wife join in all deeds and mortgages affecting real estate except unpatented mining claims.

In the case of *Pendleton* v. *Brown, supra,* the Supreme Court of Arizona said (p. 617):

> The undoubted purpose of the statute is to make the husband head of the community, and to invest him with the power to manage and to dispose of the community assets. Conveyance of real estate requires the signature of the wife, but the proceeds acquired from the sale of such property ef-

> fected by means of the wife's signature is subject to the sole and exclusive control of the husband.

This view that the husband has the right to manage the community real estate subject only to the limitation as to conveyances, transfers, and mortgages has been challenged in *Schofield* v. *Gold,* 26 Ariz. 296, where it is suggested that the husband's and the wife's control over community real estate are equal. The latter case involved the question whether a wife could convey her interest in certain community real estate to her husband. It was held that she could do so notwithstanding the provision requiring the husband and wife to join in the conveyances of community real estate. It appears that the dictum that the husband and wife had equal rights of control was wholly unnecessary to the decision. The court might well have decided that it was not the purpose of the statute to prohibit such transfers and that it would be absurd to require the husband to join in a conveyance to himself. That was the view taken as to a husband's conveyance of a homestead to his wife in *Luhrs* v. *Hancock,* 6 Ariz. 340.

It is obvious that a husband's and wife's control over community real estate can not be equal because of the provisions of Section 3854, *infra,* giving the husband alone the right to make contracts which become a charge on all community property.

That their rights of control are not equal is further illustrated by the case of *Hall* v. *Weatherford,*

32 Ariz. 370, where it was held that a lease signed by the husband alone was valid, the wife being bound by the principle of equitable estoppel. In other words, such powers as the wife has in relation to the community real estate are negative, not positive. She is not a necessary party to every contract relating to community real estate. She has merely the power to prevent his conveying, leasing, or mortgaging the real estate without her consent, and if she fails to express her dissent his acts are effective. This principle is made clear by the decision in *Hood* v. *Fletcher,* 31 Ariz. 456, which arose over a conveyance executed before there was any provision requiring the wife to join with the husband in transfers of their community property, other than deeds and mortgages. In that case the husband's lease was held to be valid.

The husband, moreover, is in many cases the only necessary party in a suit affecting community real estate. *First Nat. Bank of Mesa* v. *Reeves,* 27 Ariz. 508, *supra.*

(C)

THE COMMUNITY PROPERTY IS LIABLE FOR ALL DEBTS INCURRED BY THE HUSBAND IN THE PROSECUTION OF COMMUNITY AFFAIRS AND THE PRESUMPTION IS THAT ALL DEBTS INCURRED BY HIM ARE CONNECTED WITH HIS MANAGEMENT OF COMMUNITY AFFAIRS

Section 3854, Arizona Revised Statutes, ***infra.***

First Nat. Bank of Mesa v. ***Reeves, supra.***

Cosper v. *Valley Bank,* 28 Ariz. 373.

It is at least doubtful whether the community property in Arizona is liable for the separate debts of the husband or for torts committed by him otherwise than in the prosecution of community affairs, notwithstanding that it was held in *Villescas* v. *Arizona Copper Co.*, 20 Ariz. 268, that community property might be seized and sold to pay a fine levied against the husband in a criminal action. That case has been apparently overruled by *Cosper* v. *Valley Bank, supra,* although in the latter case it was found that the debt there involved was a community debt.

Conversely, Section 3854 of the Revised Statutes of Arizona, *infra,* makes the community property liable for all community debts incurred by the husband. There is, moreover, a presumption that every debt incurred by him is a community debt. *Cosper* v. *Valley Bank, supra.*

While no decisions have been found which relate to torts of the husband, there is no reason to believe that a different rule would apply from that which applies to other obligations of the husband. The community property would no doubt be liable for the payment of damages for torts committed by the husband in the prosecution of community affairs, and there would be a presumption that a tort was committed in the prosecution of community affairs. See Point III (C) on pp. 29–31 of the argument in the brief for the Collector in the case of *Poe* v. *Seaborn, supra.*

(D)

THE WIFE ALONE CAN NOT MAKE ANY CONTRACT AFFECTING THE COMMUNITY PROPERTY OR SUE OR BE SUED IN REGARD TO IT EXCEPT THAT SHE MAY CONTRACT FOR NECESSITIES

Sections 403, 405, 3852, 3854, 3855, Arizona Revised Statutes, *infra.*

Richards v. *Warnekros,* 14 Ariz. 488.

Sections 3852 and 3854 of the Revised Statutes, *infra,* in unequivocal terms deny the wife the right to make contracts which will bind the community and give that power to the husband. In *Richards* v. *Warnekros, supra,* it was held that a chattel mortgage on community property executed by the wife alone was not enforceable, even though in giving it she was acting as agent for the husband. The only exception is that she may contract for necessities and make the community property liable. Sections 3855, 3856, *infra.*

In a suit relating to the wife's contracts for necessities, the husband and wife are both necessary parties. Section 405 of the Revised Statutes, *infra.* In other cases where she is a proper or necessary party in a suit affecting community property, it is required that the husband also be joined. For example, in *Garver* v. *Thoman,* 15 Ariz. 38, it was held that a husband was a necessary party in an action to recover on a contract for services entered into by the wife, and that the wife, although a proper party, was not a necessary party. In *Ben-*

son v. *Hunter,* 23 Ariz. 132, *supra,* it was held that in an action instituted against a married woman for work and labor, her administrator being subsequently substituted, the husband should be joined. In *Hageman* v. *Vanderdoes,* 15 Ariz. 312, *supra,* the husband was held to be a necessary party in an action relating to the wife's tort. It is of interest that the *Hageman case* fails to show whether the community property was liable for the payment of damages. The case merely holds that the husband's common law liability for the torts of the wife has been abrogated but that the husband was a necessary party because the action did not come within any of the exceptions in the statute requiring him to be joined in suits against the wife. No doubt the better view is that the community property is not liable for any tort of the wife, just as it is not liable for her debts other than debts incurred for necessities.

Attention is directed to the fact that there is no Arizona statute which provides that upon abandonment by the husband the wife acquires the right of control over community property and that no decision to that effect has been found. It appears that the wife's situation in this respect is different from that in the States of Texas and Washington. She may, however, maintain a suit against her husband for support under those circumstances. Section 3881 of the Revised Statutes, *supra.*

(E)

THE WIFE CAN NOT COMPEL HER HUSBAND TO GIVE HER ANY PART OF THE COMMUNITY INCOME OR PROPERTY WITHOUT SECURING A DIVORCE; IF SHE DOES SECURE A DIVORCE, SHE DOES NOT NECESSARILY RECEIVE ONE-HALF OF THE COMMUNITY PROPERTY

Sections 3862, 3866, 3869, 3881–3885 of the Revised Statutes, *infra.*

No case has been found in which the Supreme Court of Arizona has held that by a suit in equity or otherwise the wife can remove one-half of the community funds from her husband's control because of his dissipation or mismanagement of them. It is true that if he abandons her or commits any act which would be a cause for the granting of an absolute divorce, she may, without applying for a divorce, maintain an action against her husband for support. Sections 3881–3885, *infra.* This relief is entirely independent of the existence of any community property. In fact, any judgment against the husband constitutes a lien on his separate property. Section 3883, *supra.*

It is only in connection with proceedings for a divorce that a division of the community property may be secured or that the wife may prevent her share of the community funds from being dissipated by her husband. Section 3866 of the Revised Statutes, *infra,* enables her by injunction to restrain him from disposing of any part of the community property at any time during an action for divorce. Section 3862, *infra,* provides that the

court in pronouncing a decree of divorce shall order a division of their property in such a way as seems just and right with due regard for the rights of the children and of the parties. See also *McFadden* v. *McFadden,* 22 Ariz. 246. Section 3869, *infra,* authorizes the court to make a division of the community property between the parties "or in lieu thereof, direct the husband to pay to the wife such amounts as may be necessary for the support and maintenance of the wife, and the minor children of the parties whose custody may be awarded to the wife." Alimony may also be ordered to be paid during the pendency of the action. Section 3867, *supra.*

It is evident that these provisions are designed to make adequate provision for the wife's support rather than to protect her interest in any definite portion of the community property. They have been so construed by the Supreme Court of Arizona. *McFadden* v. *McFadden, supra.*[8]

(F)

THE HUSBAND EXERCISES SUBSTANTIALLY ALL OF THE RIGHTS OF CONTROL AND ENJOYMENT OVER THE COMMUNITY PROPERTY AND INCOME AND SHOULD BEAR THE BURDEN OF THE TAX UPON IT

From the foregoing, it must be concluded that as a practical matter the wife's interest in the com-

[8] If the court fails to make a division of community property the parties thereafter hold it as tenants in common. *Le Baron* v. *Le Bæron,* 23 Ariz. 560.

munity property is no more than a right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property. If the community is dissolved by divorce, moreover, she may or may not receive one-half. She can not interfere with the husband's contracts or bind the community by her own contracts except as to family necessities.

On the other hand, the husband, in addition to having a vested interest in community property equal in all respects to the wife's interest, has full powers of management as to community personalty and can enter into any contract regarding community real property except that he must be joined by his wife in conveying, mortgaging, or leasing real estate. The only material restriction which exists even in theory is that he can not intentionally defraud his wife.

This limitation does not confer any right upon the wife, for she has no way of removing her share of the community property from his control. If he abandons her or gives her cause for divorce, she may sue him for support, without applying for a divorce, or apply for a divorce and ask for an injunction to restrain him from dissipating the community funds. If she takes the first course, the action is entirely independent of the existence of community property. If she takes the second and ultimately secures a divorce, the court may award alimony or such division of the property as " shall seem just and right."

While the community property is apparently not made liable for the separate debts of the husband or wife or for their torts, it is made liable for the obligations of the husband incurred in the management of the community affairs and not for those of the wife except as to her contracts for necessities. Presumptively, the husband's contracts are community contracts. He also is the necessary party in all suits brought by the community and in suits against it.

Clearly, the husband in Arizona has very nearly all of the present power over the community income. Having such power, whether he is technically the sole owner or not, he exercises all of the rights of ownership and is chargeable with the tax imposed not upon him but upon that income. It should be noted that all of the income involved in this case with the exception of $42.45 consisted of salary received by the appellee for personal services. In the case of *Lucas* v. *Earl,* 281 U. S. 111, this Court held that the husband could not by assignment create in his wife such title to his salary as would make it improper to tax his entire salary to him. In this case, also, the wife has an interest in his salary upon its receipt, but is without the right to collect or spend it. The proper and reasonable construction of the Act is to require him to pay the tax.

The practical difficulties incident to the collection of the tax, if it is to be assessed against the wife,

are obvious. *United States* v. *Robbins, supra.* The wife can not pay the tax assessed against her out of the income taxed. She has no power to appropriate any of the community property to the payment of the tax.

CONCLUSION

It is therefore urged that the judgment of the District Court for the District of Arizona should be reversed.

Respectfully submitted.

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APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part as follows:

SEC. 210 (a). In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)

SEC. 211 (a). In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows * * *. (U. S. C. App., Title 26, Sec. 952.)

SEC. 223 (a). The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

Arizona Statutes

The Revised Statutes of Arizona of 1913 (Civil Code)[9] provide in part as follows:

TITLE 6

403. When a married woman is a party her husband shall be joined with her except:

(1) When the action concerns her separate property she may sue or be sued alone.

(2) When the action is between herself and her husband, she may sue or be sued alone.

404. If a husband and wife be sued together the wife may defend in her own right.

405. The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children.

865. When a person dies leaving a widow or minor children, the widow or children until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the superior court, or the judge thereof.

866. Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor

[9] The Revised Statutes of Arizona of 1913 have been superseded by the Revised Code of 1928; but the references to this brief are to the earlier compilation, since it was in force in 1927, the tax year in question.

children of the decedent, all the property exempt from execution, including the homestead, selected, designated, and recorded; provided, that such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or, in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided by law, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.

867. If the amount set apart be insufficient for the support of the widow and children, or either, the court or the judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

868. Any allowance made by the court or judge, in accordance with the provisions of this chapter, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

869. When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court can set it apart only for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order.

1100. [See amendment at end of statutes, *infra*, p. 49.]

1102. Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owners, but shall descend to and be vested in the heirs and legal representatives of such deceased joint owner, in the same manner as if his interest had been severed and ascertained.

TITLE 8

2058. Married women of the age of eighteen years or upwards may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right, without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried.

2059. Married men of the age of twenty-one years or upwards may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right, without being joined in such conveyance by the wife, as fully and perfectly as they might do if unmarried.

2060. The homestead of a family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto; and also by her acknowledgment thereof, taken and certified to before a proper officer.

2061. No conveyance, transfer, mortgage or incumbrance of any real estate which is the common property of husband and wife, or any interest therein, shall be valid unless such conveyance, transfer, mortgage or incumbrance shall be executed and acknowledged by both the husband and wife. But the provisions of this section shall not apply to unpatented mining claims, which may be conveyed, transferred, mortgaged or incumbered by the one in whose name the title or right of possession of any such mining claim may be, without the other joining in such conveyance, transfer, mortgage or incumbrance.

2062. Either husband or wife may authorize the other, by power of attorney in writing, executed and acknowledged in the manner as conveyances of real property, to sign, execute, acknowledge and deliver in the name and on behalf of the one executing the power any conveyance, transfer, mortgage or other instrument, affecting the separate property, or any interest therein, of the one

making such power, or the community property or any interest therein, and any instrument executed under such power shall be as valid as if made by the one making such power in person.

TITLE 32

3848. All property, both real and personal, of the husband, owned or claimed by him before marriage and that acquired afterward, by gift, devise or descent, as also the increase, rents, issues and profits of the same, shall be his separate property, and all property, both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be her separate property.

3849. The earnings and accumulations of the wife and of her minor children in her custody while she has lived or may live, separate and apart from her husband, shall also be the separate property of the wife.

3850. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this state relating to conveyances; provided that either

husband or wife may convey or mortgage separate property without the ot' .r joining in such conveyance or mortgage.

3851. Married women shall have the sole and exclusive control of their separate property, and the same shall not be liable for the debts, obligations or engagements of the husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by them in the same manner and with like effect as if they were unmarried.

3852. Hereafter married women shall have the same legal rights as men of the age of twenty-one years and upwards, except the right to make contracts binding the common property of the husband and wife, and shall be subject to the same legal liabilities as men of the age of twenty-one years and upwards.

3853. The separate property of the husband or wife shall not be liable for the debts of the other contracted before marriage.

3854. The community property of the husband and wife shall be liable for the community debts contracted by the husband during marriage, except in such cases as are specially excepted by law.

3855. The wife may contract debts for necessaries for herself and children upon the credit of her husband, in which case she and her husband must be sued jointly.

3856. Upon the trial of any suit as provided for in the preceding section, the court shall decree that the execution be levied, first upon the common property, second upon the separate property of the husband, third upon the separate property of the wife.

3862. [See amendment at end of statutes, *infra*, p. 50.]

3865. On and after the day on which the action for divorce shall be brought it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the property belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved, to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

3866. At any time during a suit for divorce, the wife may for the preservation of her rights, require an inventory and an appraisement to be made of all community property, and all her separate property, which is in the possession of the husband, and may obtain an injunction restraining him from disposing of any part thereof in any manner.

3867. During the pendency of such action the court may in its discretion require the husband to pay as alimony any money necessary for the prosecution of the action, or for attorney's fees, or for the support and maintenance of the wife, or minor children of the parties, and the court may in its discretion order that execution issue therefor.

3868. Pending any suit for divorce the court may make such temporary orders respecting the property of the parties, or either of them, or the custody of the children of the parties as may from time to time be deemed necessary.

3869. In the final judgment in any such action the court may, in addition to the division of the common property of the parties, or in lieu thereof, direct the husband to pay to the wife such amounts

as may be necessary for the support and maintenance of the wife, and the minor children of the parties whose custody may be awarded to the wife, as may be deemed necessary or proper, and may direct that said amount may be paid in one sum, or installments, and may enforce the payment thereof by execution.

3881. When the husband wilfully deserts or abandons the wife or whenever any facts exist which would be cause for the granting of an absolute divorce, the wife may, without applying for either an absolute or a limited divorce, maintain in the superior court an action against the husband for the permanent support of herself, or of herself and children.

3882. Such proceedings shall be commenced and conducted in the same manner as actions for a divorce from the bonds of matrimony; and the court, upon motion, may award such sum for counsel fees and temporary alimony during the pendency of the action as the circumstances and situation of the parties appear to warrant.

3883. The judgment in any such action shall provide for the payment by the husband to the wife in one sum, or from time to time, such amount as may be necessary for the support of the wife or the wife and minor children, and such amount may be adjudged to be a lien upon any separate property of the defendant, and may be enforced by execution as other judgments.

3884. The court may at any time, or from time to time, after the entry of final judgment in such case amend, alter or change the provisions of such judgment with respect to the sum or sums to be so paid as the circumstances of the case may require.

3885. No action for separate maintenance, nor any judgment rendered therein, shall bar the plaintiff from the right to maintain an action for an absolute divorce upon the same grounds upon which the action for separate maintenance is based.

3886. An appeal may be taken to the supreme court from any judgment of the superior court in any action for absolute or limited divorce or separate maintenance, and from any order directing the payment of alimony, temporary or permanent, subject to the provisions of law relating to appeals in civil actions; provided, that an order directing the payment of money for the support or maintenance of the wife, or the minor child, or children, shall not be suspended or the execution thereof stayed pending any such appeal.

Section 1100 of the Arizona Revised Statutes of 1913 was amended by the Act of February 10, 1921, Arizona Session Laws, Regular, 1921, p. 6, as follows:

1100. Upon the death of the husband one half of the community property shall go to his surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation; and in the absence of both such disposition and such descendants, goes to the surviving wife. Upon the death of the wife one half of the community property shall go to her surviving husband, and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to her descendants,

equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation, and in the absence of both such disposition and such descendants, goes to the surviving husband.

SECTION 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved February 10th, 1921.

Section 3862 of the Arizona Revised Statutes of 1913 was amended by the Act of March 17th, 1919, Arizona Session Laws, Regular, 1919, p. 98, as follows:

Before pronouncing a decree of divorce from the bonds of matrimony, the court shall require evidence of the property and estate of the parties, and shall order such division of said property and estate as to the court shall seem just and right, having due regard for the rights of each party and their children, if any. Nothing herein contained shall be construed to compel either party to divest himself or herself of the title to separate property. The court may, however, fix a lien upon the separate property of either of the parties to secure the payment of any interest or equity that the other party may have in or to such separate property, or any equity that may arise in favor of either party out of property matters during the existence of the marriage relation, or to secure the payment of an allowance for the support and maintenance of the wife or minor children of the parties.

The decree of divorce shall specifically describe the real estate of the parties affected by the decree, situated in this State, and any such decree affect-

ing the title to real estate shall be recorded in the office of the County Recorder of the County, of each county in which any such real estate is situated. Any separate property of either of the parties of which no disposition is made in the decree shall remain the separate property of such party, free of all claims of the other party, and any community property concerning which no provision is made in the decree shall be from the date of such decree, owned and held by the parties as tenants in common, each owning and holding an undivided one-half interest therein.

Approved March 17th, 1919.

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